PUBLIC PROSECUTOR

v.

KATS CLEANING SERVICES (S) SDN. BHD.

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DATO' SULEIMAN BIN HASHIM J.
[CRIMINAL APPEAL NO. K41-16 of 1994]
19 DECEMBER 1994

INDUSTRIAL RELATIONS*: Employees' Social Security Act 1969 ss. 7 & 94A(1) - Social security contributions for employees - Failure to pay - Guilty plea by employer - Whether upon such plea arrears of contributions were also payable upon Certified Statement of Arrears of Contribution under s. 94A(1) being tendered by prosecution - Whether prosecution could only recover contributions in respect of the subject matter of the offence.*

INTERPRETATION: *Section 94A(1) Employees' Social Security Act 1969 - Meaning and purport - Whether words used therein mandatory and peremtory.*

WORDS & PHRASES: *"any contributions" - " prior to the date of such finding of guilt" - Section 94A(1) Employees' Social security Act 1969.*

The defendants pleaded guilty to six offences under s. 7 Employees' Social Security Act 1969 (the Act) and Regulation 32 Employees' Social Security (General) Regulations 1971 for failing to pay the required contributions in respect of their employees. The prosecution then tendered the Certified Statement of Arrears of Contributions under s. 94(c) of the Act relating to some arrears of contributions still not paid amounting to RM 21,774.50, and sought the Court's order for the payment of such arrears by virtue of s. 94A(1) of the Act. The trial Magistrate declined to order such payment and went on to hold, on the authority of *Public Prosecutor v Silectron Sdn Bhd* [1993] 2 AMR 27:1172, that the prosecution could only recover contributions in respect of the subject matter of the offence for which there was a finding of guilt but not otherwise.

The Public Prosecutor appealed and the primary issue that arose was whether bearing in mind the provisions of s. 94A(1) of the Act, as well as s. 16A(4) of Employees Provident Fund Act 1951 (Act 272), the Magistrate was right in coming to the finding aforesaid, and hence, whether *Public Prosecutor v Silectron Sdn Bhd* was rightly decided.

Held:

[1] With utmost respect this Court cannot agree with the ratio in *Silectron Sdn Bhd*. Consequently this Court holds the view that upon the Certified Statement of Arrears herein being tendered by the prosecution, the Court is under a duty to make an order in respect of contributions specified therein notwithstanding that they were not contributions in respect of the subject matter of the charges against the respondent and for which there was no finding of guilt. Upon proper construction of s. 94A(1) of the Act, it is not right to say that the order that the Court must make under that subsection must relate only to the contribution which is the subject matter of the offence for which there has been a finding of guilt.

[2] If the Legislature had intended the contributions to be only in respect of an offence for which there has been a finding of guilt, the Legislature would have said so. Instead in the said s. 94A(1), and for that matter s. 16A(4) of Act 272 as well, what the legislature did say was " any contributions .... prior to the date of such finding of guilt". There is no ambigu-

ity here as it clearly refers to "any contributions" as the subject matter and "prior to the date of such finding of guilt" as the time factor. These words are mandatorily framed, to dispense with which the law gives the Court no discretion.

[Appeal allowed. Defendants to pay arrears of contributions]

Cases referred to:
PP v. Silectron Sdn. Bhd. [1993] 2 AMR 27:1172 ***(not foll)***
PP v. Pontian Bas Bhd. [1988] 2 MLJ 530 SC ***(cit)***
PP v. Datuk Tan Cheng Swee [1980] 2 MLJ 276 FC ***(cit)***
Re: Reginald W. Goff, QC [1962] 28 MLJ 241 ***(refd)***

For the public prosecutor - Zahir Hussein Ahmad Shah, DPP
For the respondents - Chong Ket Vui; M/s Chong Ket Vui & Co.

JUDGMENT

Suleiman bin Hashim J:
On 20 August 1993 defendants were charged with having committed six offences on 12 March 1991, two in respect of each employee, for failure to pay the contributions in respect of the employees as required under s. 7 Employees' Social Security Act, 1969 (Act 4) and Regulation 32 Employees' Social Security (General) Regulations, 1971 punishable under s. 94(a) of the Act.

On 20 August 1993 defendants pleaded guilty to all six charges, were fined RM300.00 in default two weeks imprisonment in respect of each charge. I believe the fines have been paid.

There is only one issue in this appeal by the Deputy Public Prosecutor, the interpretation of s. 94A(1) of the Act.

The prosecution had tendered the Certified Statement of Arrears of Contributions under s. 94A(1) read with s. 94(c) of the Act which included arrears of contributions not only the subject matter of the present six charges but also under s. 94A(1) of the Act contributions "prior to the date of such finding of guilt", total amount RM21,774.50. The Magistrate declined to order payment of the arrears of the contributions, total amount RM21,774.50.

The Magistrate said:

> The Prosecution had earlier submitted a statement of the arrears of contributions dating back from January 1989 to July 1990 which when looking at it (the statement) are in respect of employees which are not the subject matter of the charges before which the defendant had pleaded guilty. No doubt that the statement satisfied s. 94C of the SOCSO Act, but this Court cannot make an order that the defendant pay those contributions which are not in respect of the employees and the subject matter of the charges before this Court.
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> Based on the above authorities I therefore find that the Prosecution can only recover contribution which are the subject matter of the offence for which there is a finding of guilty.

The authority relied on by the Magistrate is *PP v. Silectron Sdn. Bhd.* [1993] 2 AMR 27:1172 which referred to *PP v. Pontian Bas Bhd.* [1988] 2 MLJ 530 SC. *Silectron Sdn. Bhd.* was in respect of the interpretation of s. 16A(4) Employees Provident Fund Act 1951 (Act 272). The Magistrate found the two sections, s. 94A(1) of Act 4 before him and s. 16A(4) of Act 272 "almost *pari materia* in their wordings". The Magistrate no doubt felt bound by the doctrine of stare decisis, *PP v. Datuk Tan Cheng Swee* [1980] 2 MLJ 276 FC.

Section 94A(1) of Act 4 is:

> 94A (1) Upon any person being found guilty of any offence under paragraph (a) of s. 94, the Court before which the person is found guilty shall order such person to pay to the Organisation the amount of any contributions, together with any interest credited thereon, due and payable to the organisation and certified by the authorised officer of the Organisation to be due from such person prior to the date of such finding of guilt.

Section 16A(4) of Act 272 is:

> 16A(4) Upon being found guilty of any offence under s. 16A(1)(c) the Court before which the employer is found guilty shall order such employer to pay to the Board the amount of any contributions, together with any dividend credited thereon, due and payable to the Board and certified by an officer authorised by the Board to be due from such employer, prior to the date of such finding of guilt and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s. 426 of the Criminal Procedure Code.

I can be wrong but with utmost respect I do not agree with the judgment in *Silectron Sdn. Bhd.*

Indeed although the judgment in *Silectron Sdn. Bhd.* referred to *Pontian Bas Bhd.*, a judgment of the Supreme Court, the judgment in *Silectron Sdn. Bhd.* did conclude with:

> Therefore, with respect, *Pontian Bas* has no relevance whatsoever in so far as the present case is concerned.

In all humility I would like to repeat that I can be wrong but with utmost respect I do not agree with the judgment in *Silectron Sdn. Bhd.* that to give the interpretation as advanced by the prosecution would be to give "such a wide interpretation", that "it cannot be the intention of the EPF Act that the Court is under a duty to make an order in respect of contributions other than those which have become the subject matter of the charges against the respondent and for which the respondent has been charged and found guilty", that "the inference is that the order that the Court must make under that subsection must relate only to the contribution which is the subject matter of the offence under s. 16A(1)(c) for which there has been a finding of guilt."

With utmost respect if the Legislature had intended contributions to be only in respect of contributions to offence/s for which there has/have been a finding of guilt, the Legislature would have said so. Instead in the two sections the Legislature did say "any contributions,....prior to the date of such finding of guilt." I think the operative words are "any contributions" and "prior to the date of such finding of guilt."

The judgment in *Silectron Sdn. Bhd*. goes on to say:

> Even assuming the words '.....the amount of any contributions .....prior to the date of such finding of guilty....' create an ambiguity....'

Thus only "even assuming", not that there is any ambiguity.

With utmost respect I agree there is no ambiguity. It clearly, plainly, unambiguously refers to "any contributions" as the subject matter and "prior to the date of such funding of guilt" as the time factor.

I think the operative words in the two sections are "mandatory and peremptory". And some thirty two years ago in *Re:Reginald W. Goff*, QC [1962] 28 MLJ 241, Thomson C.J., as he then was, had occasion to say:

> The opening words of the section are clearly mandatory and peremptory and in my view they constitute a condition precedent which must be complied with before a petition can be heard. I have examined the Ordinance with very great care and I can discover no provision in it which enables me to exercise any discretion to dispense with that condition precedent. I appreciate that in the present case there would be very great difficulties facing the petitioner in complying with it. I appreciate that it is reasonable to suppose the petitioner would have no difficulty whatsoever in complying with condition. But these considerations, to my mind, do not justify me in disregarding a condition precedent which is framed in mandatory and peremptory terms and to dispense with which the law gives me no discretion.
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> Judges are not here to make the law. They are not here to find faults in the law. They are here to administer and declare the law as it has been set out by the legislature. If, therefore, what I have said creates any difficulty it is a matter for the legislature to deal with. After all I am here to enforce the law. I am not here to set a bad example to the public by driving a coach and horses through it.

In the present matter before me I think the operative words in the two sections are "framed in mandatory and peremptory terms and to dispense with which the law gives me no discretion."

I allow this appeal by the Deputy Public Prosecutor. I order that defendants do pay up the arrears of the contributions, total amount RM21,774.50.